

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE T.S. ELLIS, III  
UNITED STATES DISTRICT JUDGE

**APPEARANCES:**

FOR THE PLAINTIFFS: ELEANOR MICHELLE DRAKE  
BERGER MONTAGUE, PC  
1229 Tyler Street NE  
Suite 205  
Minneapolis, MN 55413  
612-594-5933

KRISTI CAHOON KELLY  
KELLY GUZZO, PLC  
3925 Chain Bridge Road  
Suite 202  
Fairfax, VA 22030  
703-424-7570

FOR THE DEFENDANTS: JOHN S. MORAN  
McGUIRE WOODS, LLP  
888 16th Street, NW  
Suite 500  
Black Lives Matter Plaza  
Washington, DC 20006  
202-857-1700

(APPEARANCES CONTINUED ON  
FOLLOWING PAGE)

1  
2 FOR THE DEFENDANTS:

KATHERINE ELIZABETH LEHNEN  
McGUIRE WOODS, LLP  
Gateway Plaza  
800 East Canal Street  
Richmond, VA 23219  
804-775-7887

3  
4  
5 OFFICIAL COURT REPORTER: REBECCA STONESTREET, RPR, CRR  
6 U.S. District Court, 9th Floor  
7 401 Courthouse Square  
Alexandria, Virginia 22314  
(240) 426-7767  
8

9 ( Pages 1 - 54)

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11 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES  
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# PROCEEDINGS

6 MS. DRAKE: Good afternoon, Your Honor. Michelle Drake  
7 on behalf of the plaintiff.

14 MS. DRAKE: I'm anxious to leave it on, Your Honor, if  
15 the court reporter is able to understand me.

16 THE COURT: I think you're doing all right. Yes, you  
17 may do so.

18 MS. DRAKE: Than you, Your Honor. Michelle Drake on  
19 behalf of plaintiffs. And with me today is my colleague,  
20 Kristi Kelly.

21 THE COURT: All right. Thank you.

22 And for the defendant?

23 MR. MORAN: Good afternoon, Your Honor. John Moran for  
24 the defendants. And with me is my colleague, Katie Lehnern.

25 THE COURT: Good afternoon to both of you. This matter

1 is before the Court on a motion to dismiss. I have reasonable  
2 familiarity with your briefs. You're moving to dismiss not only  
3 on 12(b) (6), but also on standing with respect to a part of it.

4 I have a number of questions. Mr. Moran, let's begin  
5 with you. You're the movant.

6 MR. MORAN: Yes, Your Honor.

7 THE COURT: Am I correct that the crux of the claim by  
8 the class is that Capital One, in its issuance of a credit  
9 card - either Visa or MasterCard, probably - uses an exchange  
10 rate that's disadvantageous? In other words, in the old days,  
11 if you arrived at an airport in Europe, the first thing you  
12 would do is you would see where you could get local currency,  
13 before the Euro and all that stuff, and you would see the  
14 exchange rates fluctuate over time. And the plaintiffs in this  
15 case, the class of plaintiffs, argue that Capital One Master and  
16 Visa use an exchange rate that's advantageous to them but not to  
17 the cardholder. Is that kind of the gist of it?

18 MR. MORAN: Yes, Your Honor. Not to speak for  
19 plaintiffs themselves, but I think you've got to the heart of  
20 the matter. The central allegation is whether the foreign  
21 exchange rates that are applied to foreign transactions by  
22 cardholders exceed a contractually required rate.

23 THE COURT: All right. Now, the contractually required  
24 rate, in your view, you don't set it. Visa and MasterCard do.  
25 And so you argue in 12(b) (6) that you don't have any contract

1 with these people as to -- that is, this class, as to what rate  
2 to use.

3 MR. MORAN: Correct, Your Honor. To be clear, there's  
4 no dispute that there is a contract between --

5 THE COURT: That's right.

6 MR. MORAN: -- Capital One as the defendants, and the  
7 plaintiffs. The question is whether that contract contains a  
8 term that specifies a particular rate will be applied when a  
9 foreign transaction occurs.

10 THE COURT: And your position is it doesn't, just that  
11 Visa and MasterCard are going to do it?

12 MR. MORAN: That's correct. And I would point the  
13 Court to the specific language --

14 THE COURT: Yes, you can in a minute. I want to get  
15 these preliminary matters out of the way and then I'll let you  
16 argue further.

17 Now, another point that you've made in the briefing is  
18 that the named plaintiffs don't have standing with respect to  
19 debit cards, only credit cards. And there's a different  
20 contract, and so they don't have standing. Is that correct?

21 MR. MORAN: That's correct, Your Honor.

22 THE COURT: And what's the argument that the plaintiff  
23 makes against that?

24 MR. MORAN: So as I understand plaintiff's argument, it  
25 is, in short, that the real question, as they see it, is whether

1       their named plaintiffs, who are credit card holders, can  
2       represent debit card holders in the class action that they  
3       intend to bring if they survive the motion to dismiss and move  
4       for class certification.

5               THE COURT: All right.

6               MR. MORAN: And we view it slightly differently.  
7       Because what we have before the Court today is a complaint that  
8       is brought, for now, on behalf of individual plaintiffs. It  
9       contains allegations about what Capital One does with its debit  
10       cards, and it seeks relief that would include injunctive relief  
11       related to credit cards.

12               And our position, and we think it's supported by the  
13       law, is that in order to bring those claims for now --

14               THE COURT: All right.

15               MR. MORAN: -- they need to show Article III standing.

16               THE COURT: Yes, I'll let you say more about that. The  
17       final point I wanted to cover, I was amused to see that the  
18       plaintiffs define a class in a way that excludes judicial  
19       officers. And it got me to thinking and reminiscing -- I'm an  
20       old man and so I reminisce a lot. Many years ago, when your  
21       firm was still McGuire Woods Battle & Boothe, I lived in  
22       Richmond, practiced in Richmond with a then larger firm. And we  
23       appeared -- we represented PEPCO, and we appeared in a case and  
24       Judge Merhige was the presiding judge, whom I succeeded when he  
25       took senior status in the mid '80s, 1980's. Some would argue it

1       might be 1880, but that's not true. I am old but not that old.  
2       Anyway, that was resolved because all judges had PEPCO. Some  
3       judges did recuse themselves. But now the plaintiff has defined  
4       it to exclude judicial officers.

5               Let me ask you, has there ever been a case that's  
6       questioned the proprietary or legitimacy of defining a class to  
7       exclude judicial officers to avoid the problem of a conflict?

8               MR. MORAN: Well, I'll confess, Your Honor, that I  
9       haven't looked specifically into that question, I think in part  
10      because our view is that all that's before the Court today is a  
11      complaint brought on behalf of individual plaintiffs. Now, of  
12      course --

13               THE COURT: So you think I don't even need to reach it  
14      because of what's before the Court today.

15               Well, it's now a common provision in these class  
16      actions, to exclude judicial officers, which I find a bit  
17      amusing. I'm not sure it's always appropriate or legitimate,  
18      but I don't see a problem here. I take it you don't either?

19               MR. MORAN: Not necessarily. Your Honor, to think out  
20      loud just briefly, I think if there were a material likelihood  
21      of damages being awarded, then, you know, I think a judge who is  
22      carved out doesn't necessarily have skin in the game. If there  
23      were injunctive relief that were directly at issue, it might  
24      affect that judge.

25               But again, at least for now, my sense is that we

1 have --

2 THE COURT: Well, all of this is prompted by the fact  
3 that I have Visa cards, my wife has Visa and Master, I have Visa  
4 and Master, and my wife has a Capital One card. I don't know  
5 whether it's Visa or Master or something else. But she has one.  
6 I don't. So that's why I wanted to look carefully at that.

7 But I think your view is that the real focus here  
8 should be on Visa and Master because they're the ones who  
9 determine what exchange rate to use?

10 MR. MORAN: Well, that's our substantive point,  
11 Your Honor. And maybe the last thing I'll say --

12 THE COURT: -- doesn't have a conflict there.

13 MR. MORAN: Well, I guess the last thing I would say  
14 is, if Your Honor would appreciate additional briefing on it,  
15 we're happy to look at it. But we haven't come prepared today  
16 to weight in on that.

17 THE COURT: No, that's not necessary. But you don't  
18 seek my recusal and neither do the plaintiffs?

19 MR. MORAN: We are certainly not requesting it,  
20 Your Honor.

21 THE COURT: And is that true also of the plaintiffs,  
22 Ms. Drake?

23 MS. DRAKE: It is, Your Honor.

24 THE COURT: I think that's sufficient preliminary  
25 matters. I think I have a view generally. Now, if you want to

1 go into detail, Mr. Moran, and tell me why you think the  
2 provisions in the contract with Capital One credit cards don't  
3 lead to any liability, given the allegations here.

4 So go ahead and address the two main issues.

5 MR. MORAN: Sure. And I agree that those are the two  
6 main issues here. And to go a little bit backwards, I think  
7 I'll get to the language of the contracts in a moment. But I  
8 think before doing that, I would like to point out that one of  
9 the key questions here is the existence of a promise on behalf  
10 of Capital One, but the natural question that goes along with  
11 that is, if there is a promise, what are its terms? What is it  
12 that Capital One is alleged to have promised?

13 In their opposition, plaintiffs claim that their  
14 complaint, quote, identifies specific promises within the  
15 cardholder agreements which, quote, detail the specific  
16 procedures that Capital One promised the processors would use in  
17 selecting FX rates for payment cardholders' foreign  
18 transactions. So the center of their response to the motion to  
19 dismiss is that the contracts have specific promises that detail  
20 the precise procedures that will be applied.

21 And at least in my view, if the contract did contain  
22 such a promise and did specify such detailed procedures, then  
23 there are a number of questions that it would address, such as,  
24 how does each network calculate the FX rate that's going to  
25 apply when a foreign transaction is conducted? What is meant by

1 a wholesale exchange rate, and how is that rate supposed to be  
2 selected? If the wholesale exchange rate is not a single fixed  
3 rate, how do the networks choose among the available options for  
4 any given transaction? And if - and this is to quote the  
5 processor rules - if a network starts with or uses a wholesale  
6 rate, what else are they supposed to do after they've started,  
7 or how do they use it?

8 So if Capital One had made a promise to cardholders  
9 about the FX rates that would be used and about the procedures  
10 that would be followed, I think you could reasonably expect  
11 these questions to be answered.

12 So then we look at the agreements in question. And the  
13 first is the credit card agreement, and that's the one that we  
14 think is most squarely at issue because the named plaintiffs are  
15 credit card holders. We've included this as Exhibit A. It's  
16 ECF 28-1. And this is on page 9 at least of the PDF that you  
17 get when you look up 28-1. And under a heading of "Transactions  
18 Made in Foreign Currencies," the agreement says: "If you make a  
19 transaction in a foreign currency, the Payment Card Network" -  
20 that is, Visa or MasterCard - "will convert it into a  
21 U.S. dollar amount. The Payment Card Network will use its own  
22 currency conversion procedures. The conversion rate in effect  
23 on the processing date may differ from the rate in effect on the  
24 transaction date that appears on your statement. We do not  
25 adjust the currency exchange rate or charge any currency

1 conversion fees." And that's the end of the provision.

2 And our simple contention is that nothing in that  
3 paragraph says that customers are entitled to a specific rate,  
4 that Capital One will take steps to guarantee that they get a  
5 particular rate, or that the networks will process those  
6 transactions or select their rates in any particular way. The  
7 closest it comes is to say that the Payment Card Network will  
8 use its own currency conversion procedures.

9 And this is the hook that plaintiffs try to use to say  
10 that by saying that Visa and MasterCard will use their own  
11 procedures, Capital One is incorporating by reference the rules  
12 that those networks have adopted, and is promising or  
13 guaranteeing that no matter what, Capital One is going to take  
14 steps to make sure that they get that rate. And with respect,  
15 we think you frankly can't get that juice with that squeeze,  
16 that that's not what the provision says.

17 THE COURT: Get that juice by that squeeze. That's a  
18 new one on me. I'm all in favor of metaphors and similes. That  
19 one, I like that. Can't get juice from that squeeze.

20 MR. MORAN: I was debating whether to retract it,  
21 Your Honor.

22 THE COURT: No, don't retract it. Metaphors and  
23 similes are the fuel with which we think and reach conclusions.  
24 The more often we use them, the better. That one doesn't help a  
25 whole lot, but it is humorous, and that's a plus these days.

1                   MR. MORAN: I will take it.

2                   And again, Your Honor, with respect to the debit card  
3 agreements, we argue that those aren't relevant. But because  
4 plaintiffs have relied on them in their argument, I would like  
5 to address those as well.

6                   THE COURT: Well, before you go on, tell me once again  
7 why you think their argument that the incorporation -- they  
8 argue that by saying that the Visa and Master are going to use  
9 their procedures and a foreign exchange rate, they say that  
10 incorporates what Visa and MasterCard do in the Capital card.  
11 Right?

12                  MR. MORAN: That's their position, yes, Your Honor.

13                  THE COURT: And tell me once again, without the juice  
14 and the squeeze, why you think that argument fails.

15                  MR. MORAN: Sure. Well, I think at a most basic level,  
16 Your Honor, there are two reasons it fails. One, it's not  
17 enough to mention -- so first of all, the rules themselves are  
18 not incorporated by reference. The closest that we come is the  
19 statement that the Payment Card Network, quote, "will use its  
20 own currency conversion procedures."

21                  Now, they construe that to mean that they will follow  
22 the capital "R" Rules which are published. And I'm not saying  
23 it's unfair to connect the procedures with the Rules, but it's  
24 not as if a specific document here is being incorporated by  
25 reference.

1                   But I think under Virginia law and the cases that we've  
2 cited, the more important note is that there's nothing  
3 promissory there about the language. And the mere fact that  
4 Capital One recites in its agreement that the networks will use  
5 their own currency conversion procedures is not sufficient,  
6 under Virginia law, in our view, to create an enforceable and  
7 binding promise. And I think the two cases that help to  
8 illustrate that principle most clearly would be *Utica Mutual*  
9 *Insurance Company and Smith vs. Farrell*.

10                  So in *Utica Mutual Insurance Company*, there was a  
11 rental of construction equipment or industrial equipment of some  
12 sort, and the boom pump operator -- as an aside, my 4-year-old  
13 son loves boom pumps, so we watch a lot about them. It said the  
14 boom pump could not operate to within 17 feet of an electric  
15 line. And so this was -- the company that was renting the boom  
16 and supplying the operator to a larger construction site said in  
17 what was labeled the Agreement that they could not operate a  
18 boom pump within 17 feet of an electrical line. Well, in that  
19 particular case, the boom pump was operated within 17 feet of an  
20 electrical line, and damage ensued that led to the suit at  
21 issue.

22                  And what the court said in *Utica Mutual Insurance*  
23 *Company* is that by indicating that the boom could not operate  
24 within 7 [sic] feet of an electrical line, the rental company  
25 was not making a promise that their operator would not move it

1       within 17 feet of an electrical line; they were merely  
2       disclosing to the renter that that was a limitation on the  
3       equipment, and that it shouldn't be operated within 17 feet of  
4       an electrical line. Because in reality, the party that rented  
5       the boom was ultimately in charge of how that construction site  
6       was going to be run, and so they could not turn around and sue  
7       the renter for that language.

8               And so what that establishes and illustrates is that  
9       agreements often contain declarative statements that are not  
10       intended as contractual promises. They don't have the  
11       indicative language of, you know, "shall" or "agree" that  
12       indicate that the party is making a promise. They're merely  
13       disclosures about how the parties expect things to go. And  
14       *Smith vs. Farrell* is of a piece with that.

15               In *Smith vs. Farrell*, the parties were negotiating over  
16       the sale of homes that were to be built on a large tract of land  
17       in Maryland, and in the course of this discussion, the builder  
18       represented that they intended to build thousands of houses on  
19       the property, and that the plaintiff in the case would have the  
20       right, the exclusive right, to market the first 1,500 houses  
21       that were built in that way.

22               Well, as things turned out, they only built three or  
23       four houses, and the plaintiff sued saying, in the course of  
24       this negotiation, you promised us that you would build at least  
25       1,500 houses. And what the court said is, no; in fact, there

1 was no such promise. Yes, in the course of the discussions the  
2 defendant said that they intended -- that they would, that they  
3 would build more than 1,500 houses, but just because they  
4 disclosed that expectation, and just because the parties both  
5 relied on that as part of the reason why they wanted to enter  
6 into the contract, didn't mean that building 1,500 houses became  
7 an enforceable contract.

8 And I guess the one other case I would point to - and  
9 it's not a Virginia case but I think it illustrates this  
10 principle nicely as well - is *United States vs. Hamdi*, a  
11 decision from 2005, the Second Circuit Court of Appeals, in an  
12 opinion authored by then Judge Sonia Sotomayor. And there it  
13 was not a commercial contract, it was a plea agreement between  
14 the United States and the criminal defendant, and it included  
15 recitations about what the parties expected to happen during the  
16 sentencing. And what Justice - then Judge - Sotomayor noted is  
17 that, quote, "parts of the agreement simply cannot be  
18 interpreted as covenants or promises to perform because they are  
19 beyond the power of either party to promise."

20 And again, if you look at it, it's a declarative  
21 statement that's contained in what's indisputably an agreement,  
22 but the mere fact that a future expectation was recited in the  
23 agreement did not amount to an enforceable contractual promise.

24 So that's a long-winded way, Your Honor, of getting to  
25 your question, which is, why do we think that the statement in

1 the agreement that, quote, "the Payment Card Network will use  
2 its own currency conversion procedures," is not an enforceable  
3 promise? It's not a guarantee by Capital One that they will  
4 take some undisclosed affirmative steps to assure that the rate  
5 is a particular type of rate or that it's processed in a  
6 particular way, it's merely a disclosure to the customer - and  
7 now the plaintiff - of how this whole thing is going to work.

8 And again, I indicated that despite the standing issue  
9 we've raised, plaintiffs have looked at the deposit agreement,  
10 and we think in some ways that language makes this issue even  
11 more stark. So here's the language from the deposit account  
12 agreement. This is ECF 28-2, and this is on page 38 of the PDF,  
13 as we have it: "Transactions made with your card in foreign  
14 currencies, and transactions that are classified by MasterCard  
15 as cross border transactions (generally, transactions that are  
16 processed outside the United States) are called," quote,  
17 'foreign transactions,'" end quote. "If a foreign transaction  
18 is in a foreign currency, it will be posted to your account in  
19 U.S. dollars. The exchange rate between the foreign currency  
20 and U.S. dollars is a rate selected by MasterCard. Basically  
21 here's how MasterCard calculates the exchange rate. They  
22 usually start with either a government mandated currency rate or  
23 a wholesale rate as of the day your foreign transaction is  
24 processed; i.e., not the date you made your purchase and not the  
25 date your purchase is posted on the statement."

1                   And that's the end of the provision. And we submit  
2 that it's rather curious, if Capital One were promising a  
3 particular -- a specific set of procedures, as plaintiffs  
4 claimed in their opposition, that you would find language like,  
5 basically, this is how it works, or they usually start with one  
6 of these two types of rates. And we think that language just  
7 further illustrates that what this language is trying to do is  
8 to inform and educate the customer about how these things work,  
9 but is not making a contractually binding promise to perform.

10                  And so that's the central piece of our contention. I  
11 think if we go to the state unfair trade transaction claims,  
12 there's an even higher burden of pleading with particularity.  
13 And the reason that's especially relevant is because as  
14 Your Honor said at the outset, I think it's fair to say that the  
15 basic argument that plaintiffs make is that they are entitled to  
16 a, quote, "wholesale exchange rate," end quote, and that what  
17 they received is not a, quote, "wholesale exchange rate," end  
18 quote.

19                  Now, you know, as we point out, the contract doesn't  
20 define what that means. And there are lots of different things  
21 that somebody could think about what that means. But that's not  
22 the only theory that's alleged in the complaint. They allege in  
23 the complaint that the agreements, quote, "created the  
24 objectively justified expectation that the rates applied for  
25 foreign currency transactions would bear some resemblance to

1       rates actually paid by Capital One and/or the processors on the  
2       applicable date." And that's the complaint at Paragraph 89.

3               Now, an allegation that the rates that were charged  
4       don't bear some resemblance to rates actually paid is very  
5       different from an allegation that the rates don't meet some  
6       contractual definition of wholesale exchange rate. In  
7       Paragraph 14 they allege that the rates, quote, "bear no  
8       resemblance to any exchange rate obtained, or that could be  
9       obtained in wholesale markets," end quote. Now, that at least  
10      relates to things going on in wholesale markets, but it doesn't  
11      connect back to why that would meet some contractual definition  
12      of wholesale exchange rates.

13               In Paragraph 15, they allege that the rates were  
14      improper because they did not, quote, "approximate," end quote,  
15      the, quote, "actual costs of acquiring foreign currency to  
16      settle transactions," end quote. So now we've introduced a new  
17      concept, that Capital One allegedly made a promise not only that  
18      the rates charged would be wholesale exchange rates - which for  
19      credit card customers is not a phrase that even appears in the  
20      agreement, it appears in the processors' rules - but also that  
21      those rates have to bear some relationship to the actual costs  
22      of acquiring foreign currency.

23               Then, in Paragraph 90, they allege that the agreements,  
24      quote, "created the objectively justified expectation in  
25      cardholders that the spread between the rates would bear a

1 reasonable relationship to the bid/ask spread experienced by  
2 participants this the FX wholesale market," end quote.

3 So now in Paragraph 9 to we have a new concept. The  
4 concept -- as Your Honor noted, when you went to the kiosk, you  
5 got off the plane in Italy and you went to the kiosk, I'm sure  
6 you noticed that the rate for changing dollars into *lira* was not  
7 as good as the rate for changing *lira* into dollars, and there  
8 was a bid and ask spread that the merchant who is changing the  
9 money used to generate their profit. And so now they've  
10 introduced a new concept that the contract with credit card  
11 customers, which says nothing about anything specific about how  
12 this is done, also contains some sort of promise that the rates  
13 charged would bear a reasonable relationship to the bid/ask  
14 spread.

15 So what these and other allegations in the complaint  
16 show, and why we think this is important particularly in the  
17 light of the particularity pleading requirement under Rule 9(b)  
18 for their unfair trade practice claims, is that Capital One has  
19 a right to know, first of all, under the particularity pleading  
20 standard, what theory they're alleged to have violated, why  
21 these rates are allegedly wrong. And that's a problem that's  
22 exacerbated, because, as the pleadings make clear and as reality  
23 is, Capital One is not the party who is doing these  
24 transactions, and so it doesn't have the insight to re-create  
25 for itself what theory of plaintiffs actually has traction.

1                   But, more importantly, even setting aside the  
2 particularity standard, we think that this multiplicity of  
3 theories just further shows that the language in the agreement  
4 is not a contractual promise because it can't bear the weight  
5 that plaintiffs try to put on it. They try to say that it  
6 answers all of these subsidiary questions about how the rate is  
7 going to apply, what relationship is there going to be between  
8 the rate that's charged and the bid/ask spread, what's the  
9 relationship going to be between the rate that's charged and the  
10 rates that are actually paid. And some of these are even  
11 potentially conflicting theories.

12                  So, for example, if the contract required that the rate  
13 has to be related to the rates actually paid, that might not be  
14 the rate that's available on the wholesale exchange market,  
15 because not every transaction is cleared through the wholesale  
16 exchange market. So even there we have conflicting theories.

17                  And what we have in the complaint is a series of  
18 allegations that, based on an analysis -- which is an analysis  
19 that plaintiffs don't actually plead. They don't disclose what  
20 their analysis is, they just say in a conclusory manner that  
21 based on their analysis, the rates that were charged exceed the  
22 rates that were under the contract. So again, as to this point  
23 about particularity especially, we think Capital One is entitled  
24 to know what rates the plaintiffs think they were supposed to be  
25 charged, and why they think they were charged a rate that wasn't

1 fair.

2                   But again, even setting aside that particularity  
3 requirement, it all further goes to show that the contract  
4 doesn't have such a promise in the first place.

5                   THE COURT: All right. I think you've covered your  
6 argument on the 12(b) (6). Let's separate that from the standing  
7 argument. Let me hear from the plaintiff just on that issue,  
8 and then we'll get to standing. But since you have the burden,  
9 you're the movant, I'll give you an opportunity to respond to  
10 whatever Ms. Drake argues.

11                   MR. MORAN: Thank you.

12                   THE COURT: Ms. Drake, let me begin by asking a  
13 different question, and then you can come back to addressing  
14 what Mr. Moran has argued. Why didn't you sue Capital One,  
15 Visa, and MasterCard together? Why are you suing Visa and  
16 MasterCard in New York and this case here?

17                   MS. DRAKE: It's a fair question, Your Honor.

18                   THE COURT: Well, fairness is supposed to be a hallmark  
19 of what I do. So I'm glad you think it's a fair question.

20                   MS. DRAKE: I would say it's an excellent question.  
21 And what I can tell the Court is that we had many internal  
22 discussions about the propriety of how to structure these  
23 lawsuits. I don't want to get too far into our strategy  
24 reasoning, but one thing I would note for the Court is that the  
25 classes as pled in the Visa and MasterCard cases include banks

1 in addition to Capital One, because the procedures that the  
2 processors use do not vary from bank to bank, and various banks'  
3 agreements also do not vary.

4 So from a jurisdictional perspective, the safest place  
5 to sue processors for conduct which encompasses customers of  
6 multiple banks is likely in the processors' home jurisdictions,  
7 not in the banks' home jurisdictions. There could -- and I  
8 don't want to go any further than this, so I'll raise just one  
9 potential question. Visa may have complained, for example,  
10 about being sued in Virginia for conduct that related to a  
11 Bank of America borrower, where Bank of America is headquartered  
12 in North Carolina.

13 THE COURT: What is your answer -- I think I've heard  
14 part of it. But what is your answer to the central point made  
15 by the defendant that, look, we did not promise any specific  
16 exchange rate, we said that the processors were going to do it,  
17 and your beef is with the processors in that regard, not with  
18 us. Because we didn't promise any particular exchange rate or  
19 any particular result from using an exchange rate.

20 MS. DRAKE: We believe that in its agreements, its  
21 self-termed agreements with its own cardholders, Capital One did  
22 in fact make a promise about what its agents, its delegates, the  
23 processors, would do. And thinking about the credit card  
24 agreement in particular, which states that the processors will  
25 use their own procedures, that is an incorporation by reference

1 of the Visa rules and the MasterCard rules, to which Capital One  
2 has agreed. Those are public documents.

3                   Saying that the processors will use the processors'  
4 procedures for foreign currency conversion means something. It  
5 means something more and different than saying, for example,  
6 Visa will convert your money however it feels like it. That's  
7 not what they said. They said the processors will convert  
8 according to the processors' procedures.

9                   And we didn't just go out and hopefully figure out what  
10 those procedures were. They're in a published document that we  
11 cite as to both MasterCard and Visa in Paragraphs 54 and 55 of  
12 our complaint, where Visa and MasterCard publicly lay out  
13 precisely what those procedures are.

14                   And so when Capital One tells its customers, when you  
15 engage in a foreign transaction with us, Visa and MasterCard are  
16 going to apply their procedures, that means Visa and MasterCard  
17 are going to apply the Visa and MasterCard rules to which  
18 Capital One has agreed and that are published. And I would  
19 note --

20                   THE COURT: So if they're published and everyone had  
21 notice of them, and they used them, where is the breach?

22                   MS. DRAKE: The issue is that Visa and MasterCard did  
23 not abide by their published procedures.

24                   THE COURT: All right.

25                   MS. DRAKE: That's the briefs, Your Honor.

1                   THE COURT: All right. Go on.

2                   MS. DRAKE: What I also wanted to say is that  
3 Capital One, in the briefing, likes to make a big deal out of  
4 the fact that Capital One says: We do not adjust the rates that  
5 are applied by the processors. I view that language as harmful  
6 to Capital One, because to me it undergirds the fact that  
7 Capital One is promising a rate that will be determined  
8 according to a particular procedure, that Capital One will not  
9 then change. Why would Capital One tell its customers, you are  
10 going to get a rate developed according to a particular  
11 procedure, we will not change that rate, if there was no rate  
12 promised in the first instance? It doesn't make any sense for  
13 me to say, you're going to get some random thing and I'm not  
14 going to change it. It's not just some random thing. Saying  
15 Visa and MasterCard's procedures, it means something and it  
16 means something definite.

17                  You know, the Court chuckled at the phrase, "you can't  
18 get the juice for the squeeze." The phrase that comes to mind  
19 for me with respect to foreign exchange rates is, this is not  
20 rocket surgery, which is something that one of my partners likes  
21 to say.

22                  THE COURT: Rocket surgery? You're mixing your  
23 metaphors there.

24                  MS. DRAKE: That's right. That's why I think it's  
25 funny, because it's neither rocket science nor brain surgery.

1                   THE COURT: Well, that doesn't communicate that.

2                   MS. DRAKE: Perhaps it was just a poor attempt at  
3 humor, Your Honor. I always chuckle when he says it. I think  
4 what he means is that, this isn't super complicated. Like,  
5 we're not doing brain surgery and we're not doing rocket  
6 science.

7                   And I think I feel the same way about the application  
8 of foreign exchange rates. Capital One made a lot of arguments  
9 about, oh, if this was really an agreement about exchange rates,  
10 and the Visa procedures and the MasterCard procedures were  
11 binding, we would expect them to specify all these things. But  
12 the specification of an exchange rate is very simple. What  
13 cardholders were told is that they would receive a wholesale  
14 market rate. There isn't --

15                  THE COURT: Yeah, but where is that?

16                  MS. DRAKE: In Paragraphs 54 and 55 of the complaint.

17                  THE COURT: No, I know it's in your complaint. Where  
18 is it in the agreement? The fact that you put it in the  
19 complaint doesn't mean it's in an agreement.

20                  MS. DRAKE: So the credit card agreement is in  
21 Paragraph 50.

22                  THE COURT: And where does it say, "We promise you a  
23 wholesale rate"?

24                  MS. DRAKE: So the Capital One agreement states that  
25 the Payment Card Network will use its own currency conversion

1 procedures. Those procedures are set out in the rules, to which  
2 I just referred, the Visa rules and the MasterCard rules, and  
3 the Visa rules and the MasterCard rules are in Paragraphs 54 and  
4 55.

5 And so our view is that the language in each  
6 processor's published rules is what is incorporated into  
7 Capital One's agreements with its cardholders by reference. And  
8 the rules, which we say are incorporated by reference, do  
9 specify a wholesale rate.

10 And the fact that Capital One knows that, Your Honor,  
11 is demonstrated by the language in the deposit agreements which  
12 defendant attached to its pleadings. So, you know, they say,  
13 for example --

14 THE COURT: Well, I don't find it very significant that  
15 Capital One knows what the rules are. I don't find that  
16 significant. That's sort of like saying, well, we know that you  
17 shouldn't use a boom that's more than 17 feet because you're  
18 going to hit an electric line. They knew that.

19 MS. DRAKE: I think, Your Honor, the reason that it's  
20 salient is because they included a description of those same  
21 procedures in their debit card agreements when they said that  
22 MasterCard starts with a wholesale rate. That demonstrates that  
23 what they were referring to when they said Visa and MasterCard's  
24 processing procedures are the procedures that are set forth in  
25 the published rules.

1                   THE COURT: All right. Go ahead and finish your  
2 argument, because then I want to get on to the standing  
3 argument.

4                   MS. DRAKE: So I would like to say a couple of things.  
5 On the question of whether the language at issue is contractual  
6 in nature, or as defendant would frame it, it's just some  
7 noncontractual disclosure about what a third party may or may  
8 not do, I would commend two decisions, both involving this  
9 defendant, to the Court.

10                  The first is Judge Trenga's opinion in the *Capital One*  
11 *Data Breach* case where Capital One made essentially the same  
12 argument about its notice of its own privacy policies. In that  
13 case, Capital One also came to court and said, oh, that document  
14 isn't a contract, that's just a notice about privacy policies.  
15 And the language that Judge Trenga upheld as contractual in  
16 nature was no more specific than the language here.

17                  In that case, Judge Trenga found that plaintiffs had  
18 stated a breach of contract claim based on a representation from  
19 Capital One which was: We make security a top priority, and we  
20 will protect information with controls based on internationally  
21 recognized security standards, regulations, and industry based  
22 best practices. From that same case involving the same  
23 defendant, the defendant made reference, in a disclosure to  
24 cardholders and its customers, that incorporated other standards  
25 by reference, internationally recognized security standards,

1 regulations.

2 Here, Capital One did the same thing. It incorporated  
3 the processors' rules by reference. And like Judge Trenga found  
4 in that *Capital One Data Breach* case, that Capital One had made  
5 a promise by incorporating outside standards by reference, this  
6 court should also find.

7 In the *Dress vs. Capital One* case, another Virginia  
8 federal court case, Capital One also argued that language at  
9 issue in its self-termed cardholder agreements wasn't  
10 contractual. And the court there also found that language in  
11 Capital One's cardholder agreements is contractual. Capital One  
12 has not cited any examples of courts finding these agreements in  
13 particular to merely be providing cardholders with unenforceable  
14 notice about as critical a term as what will happen when a  
15 cardholder engages in a foreign transaction.

16 This isn't merely educating someone about how a boom  
17 should be used, this is a credit card that can be used overseas.  
18 And one of the critical elements of any card that allows for  
19 foreign transactions is notice of how those transactions will be  
20 converted. To say that Capital One is not committed to anything  
21 in that regard would allow Capital One, contractually, anyway,  
22 unfettered discretion to choose whatever rate it wants; would  
23 allow the processors unfettered discretion to impose as abusive  
24 a rate as they would like. Because it's not disputed that the  
25 plaintiffs have no contractual relationship with Visa and

1 MasterCard.

2 So the consequences of saying that these agreements  
3 promised cardholders nothing are significant, and they are about  
4 a critical term in these agreements. And Visa and MasterCard  
5 are well aware. We've cited in our motion to dismiss response  
6 their arguments, which are the diametric opposite of what  
7 Capital One has said. Visa and MasterCard say to the  
8 plaintiffs: You have no quarrel with us, there's no privity  
9 here, your remedy is with your bank. Your bank possesses the  
10 ultimate authority to set exchange rates on your card; go sue  
11 your bank. So where are plaintiffs to turn?

12 THE COURT: Did you have a motion to dismiss in the  
13 case you filed against MasterCard and Visa?

14 MS. DRAKE: They have both filed motions to dismiss.

15 THE COURT: Has it been argued?

16 MS. DRAKE: They have not, Your Honor.

17 THE COURT: When is it due to be argued?

18 MS. DRAKE: We filed amended complaints in both of  
19 those cases on Monday. I believe oral argument is set in the  
20 MasterCard case for early in 2022. I don't recall offhand the  
21 precise date, or whether we have a hearing date or merely a  
22 status conference date set in the Visa case.

23 THE COURT: All right. I take it that you think that  
24 if you're right on your arguments, the liability would be joint  
25 and several for all three; that is, Capital, Master, and Visa?

1                   MS. DRAKE: I believe so, Your Honor. The legal claims  
2 are --

3                   THE COURT: Because you can't get more than one  
4 recovery for one injury.

5                   MS. DRAKE: That's exactly right. The legal claims are  
6 different. And so the measure of damages in a breach of  
7 contract claim, as you know, is the difference between what you  
8 were promised and what you received. The claims against Visa  
9 and MasterCard are pled in equity. We don't have a contract  
10 with Visa and MasterCard, so those claims are pled in equity.  
11 The measure there is the benefit obtained wrongly by the  
12 defendant.

13                  And so the measure of damages is somewhat different,  
14 because the way that Visa and MasterCard profit from inflated  
15 exchange rates is a little bit different than the way that the  
16 banks profit from inflated exchange rates, just because the way  
17 that those two companies are situated with respect to the  
18 transactions are different. Banks get interest on unpaid  
19 balances, they receive discounts on what they have to pay to the  
20 processors; whereas the processors receive inflated processing  
21 fees and they receive a bigger spread when they settle the  
22 transactions with the merchants. So --

23                  THE COURT: All right. In the interest of -- life is  
24 not endless. Do this. Why don't you address the standing  
25 argument, and then Mr. Moran can respond to that and to your

1 argument on the 12(b) (6). And then we'll be done for the day.

2 MS. DRAKE: Thank you, Your Honor. This is what I  
3 would say on standing. It's not a constitutional standing  
4 issue. No one is arguing that the plaintiffs were not injured.  
5 This is a textbook injury from an Article III standpoint.  
6 There's a financial injury and a breach of contract, either of  
7 which, standing alone, is sufficient for Article III injury.

8 What this is really about is whether plaintiffs will be  
9 allowed, at the motion to dismiss stage, to press claims on  
10 behalf of both credit card holders and debit card holders.

11 THE COURT: Why didn't you get a debit card holder?

12 MS. DRAKE: We really don't think we need one. And  
13 maybe we will amend to add one --

14 THE COURT: Well, never mind what you think you need.  
15 Prudence would have dictated that.

16 MS. DRAKE: Well, the agreements are really no  
17 different, Your Honor. The processors --

18 THE COURT: But that doesn't -- you know, what I'm  
19 saying to you is, you should have done it. We wouldn't be here  
20 arguing this if you did this.

21 MS. DRAKE: Maybe we will, Your Honor.

22 THE COURT: Maybe you will. In fact, I would go out  
23 and do it right now.

24 MS. DRAKE: If the Court doesn't want me to press the  
25 point further, I won't.

1                   THE COURT: Well, I don't see any point in going  
2 forward on something that is problematic, uncertain, when it's  
3 easily resolved. If it's true that there are the same  
4 provisions in the debit card, you have the same cause of action,  
5 then you don't have this problem, and I don't end up writing an  
6 opinion saying there's no standing, and then you amend, and we  
7 come back.

8                   The only people who profit from that are the lawyers.  
9 In fact, I've been at this now for more than half a century, and  
10 I'm convinced that litigation more often than not profits  
11 lawyers, not parties. Particularly in class actions. If you  
12 look at the history, I've been doing this now for 34-plus  
13 years - that is, on the bench - and I am astonished at what  
14 lawyers charge hourly. I'm astonished at what lawyers seek in  
15 class actions for fees. And that comes from someone who -- when  
16 I first went to work, you know what my salary was? It was  
17 \$9,600 a year. And I thought I was overpaid, and you know what?  
18 I was. My billable rate -- I was a partner in a large law firm,  
19 and I think my billable rate when I was appointed to the bench  
20 was somewhere between 200 and 250 dollars an hour. And that was  
21 high in those days. Unbelievable what it is today.

22                   Anyway, let's do this. Let me take a brief recess. Do  
23 you have a central point you want to make on standing? Because  
24 I do think you have a problem on standing for the debit card  
25 holders. I don't think it's irremediable, particularly because

1 you tell me it's the same provisions, the same arguments. But I  
2 wonder why I should spend my time writing something about it.

3 MS. DRAKE: Well, this is what I think, Your Honor. I  
4 don't think you should spend your time writing about it because  
5 now is not the proper time to address the issue. It's at  
6 Rule 23. Here's why. Visa doesn't just have debit cards and  
7 credit cards. They have all kinds of different credit cards.  
8 Right? Banks make a lot of money by branding different credit  
9 cards. They may have a Disney credit card, an Amazon credit  
10 card, credit cards that are different colors --

11 THE COURT: But there's a fundamental difference  
12 between debit and credit.

13 MS. DRAKE: From a contractual standpoint, with regard  
14 to the provisions that matter in this lawsuit, there isn't.  
15 Because both of those agreements promise the use of a wholesale  
16 rate, and our clients didn't get a wholesale rate.

17 You know, this comes up in products cases all the time,  
18 right? The defendant will sell five different kinds of organic  
19 tea and they'll all say "organic" on the front. The plaintiff  
20 will sue and they say: I want to certify a class about all of  
21 your tea. And the defendants come to court and say: But you  
22 only bought the strawberry tea, you didn't buy the blueberry  
23 tea. And the plaintiffs says: But the misrepresentation on the  
24 package is identical. Why does it matter the flavor of the tea  
25 or the color of the box?

1                   And that's our concern here, is, I don't want to make  
2 an artificial --

3                   THE COURT: I think you make a pretty good point, but I  
4 still think it was, I don't want to say negligent or stupid.  
5 You could just have done it and it would have eliminated that  
6 whole point.

7                   Anyway, I'm going to take a recess and I will then hear  
8 your final argument, of which you can respond to both of those.

9                   And she's made a good point now about, it doesn't make  
10 any difference whether it's debit or credit, and I want to hear  
11 your response about that. But I wouldn't even be listening to  
12 that if you ginned up one more person with a debit card. But I  
13 also want to hear your response to significant arguments she's  
14 made about how this is a contractual obligation or a promise  
15 that you've made because it's incorporated.

16                   Court stands in recess. I'll recess until 5 minutes  
17 after 6:00.

18                   (Recess taken at 5:49 p.m.)

19                   THE COURT: Before I come to you, Ms. Drake, let me  
20 address one point, this thing about debit and Master.  
21 Paragraphs 50 and 51 of your complaint set out the provisions,  
22 and they're different, aren't they? The answer is yes. That's  
23 rhetorical.

24                   MS. DRAKE: Yes. Yes, the provisions are not  
25 identical.

1                   THE COURT: And doesn't that underscore the need,  
2 perhaps, to have a representative from both debit and Master for  
3 your standing problem?

4                   MS. DRAKE: Your Honor, I guess I would like to say two  
5 things. One is, I don't think it's a standing issue --

6                   THE COURT: Louder, please. I can't hear you with the  
7 mask on.

8                   MS. DRAKE: I apologize, Your Honor. I think the first  
9 thing I want to say is it's not properly a standing issue. If  
10 anything, it's a Rule 23 issue. And I can see the writing on  
11 the wall. I don't want to argue with Your Honor about the  
12 outcome or whether --

13                  THE COURT: And you may be right about it not being a  
14 standing issue. I may differ with you on that.

15                  MS. DRAKE: You may, Your Honor. I would commend to  
16 your consideration the Second Circuit's opinion in *Langan*, at  
17 page 90. It is a truly thoughtful analysis of why this is a  
18 Rule 23 issue and not an Article III issue, and it includes  
19 citations to two Supreme Court cases, including *Gratz vs.*  
20 *Bollinger*, that strongly support the argument that this is best  
21 considered in the context of Rule 23.

22                  It's also supported by the relief that Your Honor would  
23 give. Nobody is saying that any of my plaintiffs would be  
24 dismissed. If this was an Article III issue, you would dismiss  
25 claims. If it's a Rule 23 issue, you would tell me to amend my

1 class definition. And you may do that. I would argue that it's  
2 premature at this stage, but certainly within the Court's  
3 discretion.

4 But the reason that I'm raising the point is that I  
5 think intellectually it matters, because we shouldn't call  
6 something constitutional standing if really it is a prudential  
7 decision about whether it's proper for one kind of plaintiff to  
8 pursue the claims of someone else.

9 THE COURT: I'm nothing if not prudential. Thank you.  
10 You may be seated.

11 All right. Mr. Moran, look, you said in your argument,  
12 these are not promises, they're just statements. She says, no,  
13 we're entitled to rely on it; it's a promise. And she said  
14 that's a problem because we're not saying -- she says, we're not  
15 saying that you didn't -- that -- we're saying that you didn't  
16 keep your promise because those procedures were not used.  
17 That's what she's saying.

18 Now, it occurs to me, of course, that this is a typical  
19 Rule 13 issue, where you could file a third-party complaint that  
20 would say, look, I'm being sued, and they tell me that I  
21 promised them that I would use your procedures and you're not  
22 using your procedures. Therefore, if I'm liable to the  
23 plaintiff, you're liable to me.

24 I take it you've considered whether to file a  
25 third-party complaint?

1                   MR. MORAN: Well, Your Honor, for the reasons we've  
2 laid out, we don't think we need to get there. But we're not  
3 foreclosing that possibility.

4                   THE COURT: Of course not. And, you see, my interest  
5 is, I don't want different judges deciding all of this. The  
6 plaintiffs' tactic is divide and conquer. No. I think one  
7 judge ought to decide this case at the district level, and more  
8 as you go up. That's just my view, but it's a view that's had  
9 50 years of gestation.

10                  Now, let me hear from you, your response to her  
11 argument that you, in effect, made a promise; that it's  
12 different from -- her argument about the different teas didn't  
13 move me, because I think this is distinguishable from that. But  
14 tell me why, if you put in there -- if you hadn't put anything  
15 in there -- well, I haven't thought that through.

16                  Go ahead and tell me why you think her argument is not  
17 valid.

18                  MR. MORAN: Sure. And I think Your Honor raises a  
19 great point, which is, if we hadn't put it in there, for one, we  
20 wouldn't be following the guidance that Visa and MasterCard  
21 themselves give in their rules which encourages issuers like  
22 Capital One to include a disclosure that explains how these  
23 foreign transactions work. And they don't say --

24                  THE COURT: Well, they could change it at any time.

25                  MR. MORAN: They could. They could change their rules.

1       But they don't say -- in the rules they don't say, we encourage  
2       the issuers to promise a particular rate or to issue a  
3       guarantee; they say in the rules that we encourage the issuers  
4       to include a disclosure that explains basically, not in  
5       excruciating detail, not every jot and diddle, but that explains  
6       basically to the customer what happens when you conduct a  
7       foreign transaction.

8               And what plaintiff's counsel said is that if  
9       Capital One didn't create a promise, then there's just  
10       unfettered discretion and customers are at the mercy of bad  
11       actors and they can be charged anything they want. And I have  
12       two responses to that.

13               First of all, there's no principle of contract law that  
14       says that you're not allowed to have discretion, and so that if  
15       you're left discretion, it must be wrong. There must be a  
16       promise somewhere because you're not allowed to have discretion.

17               But more importantly than that, Capital One didn't  
18       allegedly outsource this responsibility to some unknown third  
19       party or some unscrupulous actor. These transactions are  
20       processed by Visa and MasterCard, which are the two largest  
21       payment processing networks in the world. They're very  
22       reputable, they're used by many issuer banks, as this series of  
23       cases illustrates --

24               THE COURT: Well, the real charge here is that they  
25       didn't do what they said they were doing.

1                   MR. MORAN: That is the charge. And frankly, that  
2 obviously remains to be seen in the Visa and MasterCard case.  
3 And if the Court were to conclude - we think contrary to the  
4 record - that Capital One made some sort of guarantee, then we  
5 might find that out in this case, too.

6                   But again, we don't think we get there because  
7 Capital One disclosed to its customers that their foreign  
8 transactions would be processed and that a rate would be  
9 selected by Visa or MasterCard, and that's exactly what happened  
10 in every one of these transactions.

11                  The last point I would like to make, Your Honor,  
12 plaintiffs' counsel brought up Judge Trenga's ruling in the  
13 security breach case. I'm, of course, not here to weigh in on  
14 the merits of that, or for my client, Capital One, who's also  
15 the defendant in that case. But I think it highlights some  
16 distinctions.

17                  There, in the security breach litigation, Judge Trenga  
18 ruled that language that was included in something that was  
19 styled as a notice or a disclosure could contain an enforceable  
20 contractual promise. And here, what we're saying is the mirror  
21 image of that; that something that's styled as an agreement can  
22 still contain a particular line of text, a particular  
23 declarative statement that is in fact a disclosure and not an  
24 enforceable promise. And so you have to do more than look at  
25 the label of the agreement to determine whether any given

1 language is promissory.

2                   And in addition, the language at issue, if the Court  
3 looks at the data breach litigation, the language there said, we  
4 will. We, Capital One, will do the following. And then it  
5 cited a specific series of standards and steps that would be  
6 taken.

7                   By contrast here, the language doesn't say that we will  
8 do anything, it says that the payment card -- the card payment  
9 network will do something. And it doesn't cite specific  
10 procedures. It doesn't say that MasterCard will follow the  
11 MasterCard rules and Visa will follow the Visa card rules, or  
12 that they're going to take a wholesale exchange rate and then  
13 they're going to do X, Y, and Z to it. It just says, in a  
14 simple declaratory manner, that they will follow their  
15 procedures. And as far as Capital One is concerned, that's what  
16 happened.

17                   Now plaintiffs may have --

18                   THE COURT: Is it significant that those rules could  
19 change at any time by the processors?

20                   MR. MORAN: Well, I think that it further underscores  
21 the lack of a contractual promise. If Capital One were making,  
22 as plaintiffs claim, a contractual guarantee that no matter what  
23 happens, we promise you today, now and for always, that you're  
24 going to get exactly what is included, whatever the outcome  
25 that's guaranteed by the rules, then you would expect that we

1       might have some certainty about what those rules say and what  
2       they're going to say in the future and the how they work.

3                   So I think respectfully, the fact that the rules can  
4       change, and that Capital One does not have a right to influence  
5       how the rules are applied, and that once the rate is set,  
6       Capital One's -- what the rules contemplate -- and plaintiffs  
7       talk about this. What the rules contemplate that Capital One  
8       can do after the rate is set is to increase it. Either  
9       Capital One can apply an additional fee or it can mark up the  
10      rate. And I think it's to the benefit of Capital One's  
11      customers, not to the detriment of those customers, that  
12      Capital One does not do that. And we say that we do not do it  
13      in the agreement. We say, we don't add our own fee, we don't  
14      mark up the rate.

15                  Now, plaintiffs want to say, well, you still have some  
16      discretion after the fact to change the rate, so you're on the  
17      hook. But the reality is, the only two changes that are  
18      contemplated by the rules are to the detriment of customers, and  
19      we don't think that Capital One should be penalized for making  
20      the responsible decision to forego those opportunities to the  
21      benefit of its customers.

22                  THE COURT: On the standing issue, do you agree that  
23      that issue goes away if they come up with a plaintiff?

24                  MR. MORAN: If they had the right plaintiff, I agree  
25      that the argument, at least as we've framed it, would not be

1 there. I do think that in the absence of that plaintiff, the  
2 Court may very well need to address that issue, which is, of  
3 course, why we raised it. As the Court knows, there's --  
4 standing is a threshold issue that generally, absent an  
5 exception, has to be addressed before the merits.

6 So we don't think on this posture --

7 THE COURT: Well, I haven't looked at this  
8 Second Circuit case that she cited today. And she contends with  
9 some force that it's not a constitutional standing issue - that  
10 is, an injury issue - it is an issue that is properly addressed  
11 at Rule 23.

12 I would have to look at this decision that she cited.  
13 I haven't looked at it. And, of course, she may well be right.  
14 But from an efficiency point of view, that's not a smart way to  
15 run the railroad. You need to get fundamental things like that  
16 out of the way. But I'm going to look at that carefully.

17 Anything else you want to say? I think I've heard  
18 enough argument this evening.

19 MR. MORAN: And so have I, Your Honor.

20 THE COURT: Let me say to the two of you, Ms. Drake and  
21 Mr. Moran, I hear a lot of arguments, and I've heard a lot of  
22 arguments in now nearly 34 plus years, 35, and 20 some years  
23 before that. And I must say, it's refreshing. You both argued  
24 very well, and I wish I had that quality argument all the time.  
25 I don't. And if I did, my work would be not easier, but at

1 least clearer.

2 Thank you for your arguments this evening. I take it  
3 you're from Richmond and you're from Minneapolis?

4 MS. DRAKE: Yes, sir.

5 MR. MORAN: I'm actually from Alexandria, Your Honor.

6 THE COURT: Oh, you're local, then. Have you got snow  
7 up there?

8 MS. DRAKE: We do, Your Honor, just this week. We've  
9 got about two inches on the ground.

10 THE COURT: But anyway, you both did a very good job  
11 and I appreciate it. It helps me.

12 MS. DRAKE: Thank you very much, Your Honor. Thank  
13 you.

14 THE COURT: The issues you raised are not as easy. I  
15 don't think your boom case was on the mark, I don't think your  
16 tea hypothetical was on the mark, but they're helpful and I'll  
17 think more about this and the arguments that you've made. Thank  
18 you.

19 Oh, maybe one more question. The other suits against  
20 the processors, are there only two? How many are there?

21 MS. DRAKE: There are two suits against the processors,  
22 yes.

23 THE COURT: Master and Visa?

24 MS. DRAKE: Yes.

25 THE COURT: Separately?

1 MS. DRAKE: Yes.

2 THE COURT: And where are they pending?

3 MS. DRAKE: They're both headed where Visa and  
4 MasterCard are headquartered. So MasterCard is in New York and  
5 Visa is in California. MasterCard's lawyer is actually here  
6 today observing.

7 THE COURT: Nice to see you, sir. And the other person  
8 here is just...

9 UNIDENTIFIED SPEAKER: I represent Visa.

10 THE COURT: So they're both here. So they both want me  
11 to say, just sue them on a third-party complaint.

12 MS. DRAKE: If they agree to be here, we're fine with  
13 it.

14 THE COURT: It's interesting, because I think your  
15 fundamental argument is that they didn't follow their process  
16 rules. Right?

17 MS. DRAKE: That's correct, Your Honor.

18 THE COURT: All right. Thank you all. I hope you all  
19 have a very Merry Christmas and a Happy New Year.

20 (Off the record at 6:27 p.m.)

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1 CERTIFICATE OF OFFICIAL COURT REPORTER

2

3 I, **Rebecca Stonestreet**, certify that the foregoing is a

4 correct transcript from the record of proceedings in the

5 above-entitled matter.

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9 //Rebecca Stonestreet//

10 SIGNATURE OF COURT REPORTER

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